OSB Corporate Counsel Section

Corporate COUNSELOR

Issue No. 2 November 2011

Visit our website:
www.osbcorporatecounsel.com

In This Issue

click to go directly to the article

Letter from the Chair
By Bob Barsocchini

How In-House Counsel Can Increase Productivity and Excellence
By Christopher Paul Moore

Corporate Designee Depositions Under ORCP 39 C(6): Be Prepared…Or Else
By Cody J. Elliott and Kieran J. Curley

A Labyrinth of Staying In Compliance: I-9 and E-Verify
By Irina S. Batrakova

Top Three Employment Law Myths From Management – BUSTED
By Karen Davis

Letter From The Chair

Dear Corporate Counsel Section Members:

First, I hope you enjoy Volume 2 of the 2011 edition of the Corporate Counselor, our Section's newsletter. I think you will find excellent articles relevant to your work. In addition, many of you have benefitted from the roundtable presentations and CLE's our section has offered this year. You can find the material from those presentations on our website. (www.osbcorporatecounsel.com).

On April 7th, we sponsored a roundtable on "Employment Law and What Corporate Counsel Need to Know". It was well attended and qualified for 1 hour of CLE credit. On May 17th, we sponsored a CLE at the Multnomah Athletic Club, including lunch, on "What In-house Counsel Should Know about Cloud Computing." This proved to be a popular topic and was also well attended and qualifies for CLE credit.

I also hope you had the opportunity to attend our hosted annual networking lunch at Oswego Lake Country Club. This is purely a social event and offers the chance to meet other section members in a casual setting. We will sponsor a free CLE on ethics in December, coupled with a roundtable presentation on a topic of interest to the section. I urge anyone who wishes to suggest a topic to contact me or one of the committee members. We will put details on our website. We will hold an annual meeting in November. Please check our website calendar for date, time, and location.

Your input and participation is important to us. The committee welcomes your participation as well as any comments and suggestions you may have. I also invite the authors out there to submit an article for next spring's newsletter. Ed Gerdes, our Editor will be happy to discuss story ideas and receive your work. You can contact Ed at ed.gerdes@cafeyumm.com. On behalf of the committee members, thank you for supporting the section and we hope you have derived value from your membership.

Sincerely,

Robert Barsocchini, 2011 Section Chair

How In-House Counsel Can Increase Productivity and Excellence

*By Christopher Paul Moore**

You have learned to be an effective in-house lawyer. Your clients ask you for advice, and although you don't always know the answers, you know how to find them and you know when to seek professional advice. But how can you distinguish yourself as an excellent and valuable in-house lawyer? Here are seven things you can start doing right now.

1. Stop Doing Some Things. Start with a list of things you can stop doing to make room for more productive activity. You already have too much to do, so before you even think about adding more to that overwhelming list, determine what can be delegated, postponed or ignored. Maybe you spend an hour going through your email first thing in the morning, or catching up on the news over a cup of coffee. Try postponing your morning email review and responses until after the first priority task is done every morning. Cut back on any distractions you engage in daily like reading

Continued

the news and instead set aside a fixed amount of time twice a week for such activity. Can you stop going to certain standing meetings, and get someone to update you separately or by email? Can you delegate review of nondisclosure agreements or standard customer contracts to someone that can work under your supervision?

2. Prioritize and Plan. Every morning before you start your day, jot down what you are going to do and when you are going to do it. Do the same at the start of each week, each month and each quarter. Your plans will probably change within seconds of your list. So revise it but stay on course. There may be some things on your list that shouldn't wait until the next day. Having that list in front of you will help you make those decisions consciously, instead of waking up in the middle of the night with the realization that you didn't follow through on a crucial commitment. The longer term plans are important to write down and refer to often. Even if you can't get to the major process improvement project this week, by making sure to set aside even a half hour during the following week, you will greatly increase your odds of getting it done.

3. Spot Risks. Most lawyers are quite comfortable in this area. We are trained to predict the future and prepare our clients for it. But often we do this deal by deal or case by case instead of taking a step back and looking at overall business practices. For example, does your technology group follow a consistent process for disclosing and reviewing potentially patentable inventions? Do terms and conditions accompany purchase orders and invoices so that you are well positioned to fight the "Battle of the Forms?" Is your human resources team consistently adhering to best practices to minimize employment litigation risk? The list of areas to look at runs long. You are probably going to find some terrifying gaps. Don't despair. Take it one step at a time. Plan and prioritize.

4. Write Down Important Processes That Have Legal Implications. In order to have a consistent process, it needs to be written down so that all the stakeholders can refer to it. For example, if you want the next sales leader to prepare certain materials for management review in advance of approving a non-US sales representative, then you better have a written process requiring it. Otherwise, if that conscientious sales leader leaves the company's employ, the next person probably won't jump through that hoop. Your current human resources leader may be extremely careful about applying hiring best practices, but the next one might have a very different idea of what those processes should be. Without a written process, you will have no consistency and high risk.

5. Cut Bureaucracy and Improve Processes. Although in-house counsel may be pushing for bureaucracy or processes that previously didn't exist in order to mitigate legal and business risks, we always must be on the lookout for ways to streamline approvals and processes. Wherever you repeat a task, there is probably an opportunity to streamline the process. This is where you can truly distinguish yourself as a valuable member of the organization. Measure the time and effort expended on a current process, find ways to streamline the process with input from the stakeholders and then measure the results. Make these longer term projects part of your plan and hold yourself accountable to finish them on time.

6. Get More For Less from Outside Counsel. This doesn't mean simply beating up outside counsel for lower hourly fees, although sometimes that is justified. Just use the same deal skills you apply to other significant supplier and customer agreements, and make sure the parties' interests are appropriately aligned. In other words, if your Chief Technology Officer wanted to hire a consultant to perform product development work, you would require the parties to put together a detailed statement of work with milestones and acceptance criteria that would clearly set performance and payment expectations. You would discourage your client from entering into a completely open-ended hourly agreement that actually incentivizes the service provider to spend too much time on a project. Although litigation is unpredictable, plan what work is to be done by milestones and get a few lawyers to provide you a fixed or maximum price to perform those tasks. Lawyers should compete for your business and they need to share a reasonable amount of risk for cost overruns. Track your spend and measure the results.

7. Communicate What You Have Done to Senior Management. You have mitigated risks, improved processes and gotten more from outside counsel. More importantly, you measured the results of these efforts and can update senior management on the year over year cost improvements. Take twenty minutes a couple times each year to update management on how the legal department is improving productivity and excellence and back it up with numbers. At the end of your presentation, focus management on goals for the next six months or year. What new processes will be required, what current processes are taking up a lot of senior management time, what risks remain inadequately addressed? Then do it all over again.

**Christopher Paul Moore is Senior Counsel to a major global product manufacturer in Tualatin, Oregon.*

The Corporate Counselor

published by the Oregon Corporate Counsel Section

November 2011 Issue

Executive Committee:

Robert J. Barsocchini (Chair)
Gary H. Lau (Chair-Elect)
Brian S. Thompson (Past Chair)
Tiffany A. Souza (Treasurer)
Tanya A. Griffin (Secretary)
Christian F. Boenisch
Kirsten J. Day
Daniel J. Field
Ann L. Fisher
C. Edward Gerdes (Editor)
Jeffrey A. Johnson
Allyson R. Keo
Vivian M. Lee
David Meisels
Ambyr M. O'Donnell
Keith Edward Parker
Matthew A. Wilson
Barbara M. Dilaconi (BOG Contact)
Lorraine R. Jacobs (Bar Liaison)

Corporate Designee Depositions Under ORCP 39 C(6): Be Prepared . . . Or Else

By Cody J. Elliott and Kieran J. Curley

Most attorneys are familiar with ORCP 39 C(6), which allows parties to take the deposition of an *organization* rather than an *individual*. But fail to be familiar with how to *prepare* a deponent for an ORCP 39 C(6) deposition and you could find yourself on the wrong side of a motion for sanctions.

Overview of ORCP 39 C(6)

ORCP 39 C(6) can be an efficient way for parties to depose an organization (defined as a public or private corporation, partnership, association, or governmental agency). Instead of taking multiple individual depositions of an organization's current and former employees, a party can simply notice the deposition of the organization under ORCP 39 C(6)—this places the burden on the organization to identify and produce a deponent (or deponents) who can testify on behalf of the organization.[1]

But ORCP 39 C(6) also requires the party seeking to depose the organization to identify "with reasonable particularity the matters on which examination is requested" in the deposition notice.[2] Contrast this with a traditional deposition, for which a party need only include the date, time, and place for questioning the deponent.

The requirement to identify deposition topics beforehand is a double-edged sword. On one hand, it requires the noticing party to "tip its hand": identifying the topics of examination *before* the deposition takes place eliminates the element of surprise that is often present in a traditional deposition.[3] But on the other hand, the requirement places the burden on the organization to identify and produce a deponent (or deponents) who can testify fully on behalf of the organization.[4]

Consider also that choosing to notice a deposition under ORCP 39 C(6) might help to avoid the expense of deposing multiple individuals from an organization, some of whom might know *some* things but not others.[5] As mentioned in the advisory committee notes to Fed R Civ P 30(b)(6)—the federal counterpart to ORCP 39 C(6)—the rule was designed to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge" of relevant facts.[6]

Preparation: traditional depositions vs. ORCP 39 C(6) depositions

At a traditional deposition, deponents must answer questions that fall within their personal knowledge. Accordingly, preparing a fact witness for a traditional deposition often involves giving advice like this:

> "If you don't know the answer to a question, don't guess—just say 'I don't know.' And if you can't remember something, don't be afraid to answer 'I don't remember.' 'I don't know' and 'I don't remember' are perfectly valid answers."

But that isn't the case for an ORCP 39 C(6) deposition. As previously mentioned, the rule requires an ORCP 39 C(6) deponent to testify *only* on the topics described in the deposition notice. But instead of an ORCP 39 C(6) deponent's "personal knowledge" of the noticed topics, he or she must be able to testify fully and completely on all "matters known or reasonably available to the organization."[7]

This presents preparation issues that are unique to organizational depositions. Corporations, partnerships, associations, and government agencies are not "people," so what do they "know"? How broadly do courts construe the requirement that an ORCP 39 C(6) deponent must testify on all matters "known or reasonably available to the organization"? And most importantly, how do you prepare a deponent to "know" everything that an organization knows?

Matters that are "known or reasonably available to the organization"

Oregon courts have not taken a close look at what types of information are "known or reasonably available to the organization." But courts interpreting Fed R Civ P 30(b)(6) have found that the following types of information qualify:

- Personal knowledge of current employees;[8]
- Personal knowledge of former employees;[9]
- Corporate documents that relate to the noticed deposition topics;[10]
- Previously entered deposition exhibits;[11] and
- Deposition testimony of prior fact witnesses.[12]

Consequences for failing to prepare your ORCP 39 C(6) deponent

Some courts consider producing an uneducated deponent who cannot testify fully on behalf of the organization—i.e.,

---

1 United States v. Taylor, 166 FRD 356, 360-61 (MDNC 1996); Marker v. Union Fid. Life Ins. Co., 125 FRD 121, 126 (MDNC 1989) (citing Fed. Deposit Ins. Corp. v. Butcher, 116 FRD 196 (ED Tenn 1986); Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Res. Auth., 93 FRD 62 (DPR 1981)).
2 See Taylor, 166 FRD at 360.
3 Ierardi v. Lorillard, Inc., No. 90-7049, 1991 WL 158911, at *3 (ED Pa Aug. 13, 1991) ("The very purpose of discovery is to avoid trial by ambush.") (internal quotation marks and citations omitted); Butcher, 116 FRD at 201.
4 Taylor, 166 FRD at 361; Marker, 125 FRD at 126.
5 See Fed R Civ P 30(b)(6) advisory committee's note (1970).
6 Id.
7 SEC v. Morelli, 143 FRD 42, 45 (SDNY 1992) (duty to prepare designee goes beyond matters personally known to deponent); Dravo Corp. v. Liberty Mut. Ins. Co., 164 FRD 70, 75 (D Neb 1995) (citing Marker, 125 FRD at 126).
8 Wilson v. Lakner, 228 FRD 524, 528 (D Md 2005).
9 Taylor, 166 FRD at 361.
10 Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., 201 FRD 33, 37 (D Mass 2001).
11 Sprint Commc'ns Co. v. Theglobe.com, Inc., 236 FRD 524, 528 (D Kan 2006).
12 Id.

someone who answers "I don't know" to questions for which the company *should* have answers—as tantamount to failure to appear at the deposition.[13] And under ORCP 46, if a party fails to appear at an ORCP 39 C(6) deposition, the court can impose sanctions that include:

- An order precluding the disobedient party from supporting or opposing certain claims or defenses;
- An order precluding the disobedient party from introducing designated matters into evidence;
- An order dismissing all or part of the action; and
- An order requiring the organization to pay the reasonable expenses, including attorney fees, caused by the failure to produce a knowledgeable deponent.[14]

Some commentators discuss ORCP 39 C(6) depositions in terms of whether the organization's answers (as given by its designated deponent) are "binding" on the organization as judicial admissions.[15] In other words, if an organization's designee answers "I don't know" to a question, does that preclude the organization from later introducing evidence on that topic? Some courts say "yes, the deponent's answers are binding on the organization," while others treat an organizational deponent's responses the same as any other deposition testimony—as something that can be refuted later.[16]

But whether or not an organizational deponent's testimony is binding on the organization as a judicial admission *is a totally different issue* from whether producing an unprepared, uneducated deponent at an ORCP 39 C(6) deposition can lead to sanctions precluding the organization from later introducing evidence on the "I don't know" topics. The rules suggest that preclusion is a potential sanction for failing to produce an unprepared organizational deponent, but courts consider this an extreme sanction, and are more likely to require the disobedient party to produce an educated deponent at a later date (and pay the expenses for rescheduling the deposition that the requesting party incurs).[17]

It doesn't have to be the "most knowledgeable" person

Finally, it is important to note that ORCP 39 C(6) does not require the organization to produce the *most knowledgeable* deponent on the noticed topics. Rather, the rule imposes an affirmative obligation to prepare a deponent to give full and complete answers on behalf of the organization. Although the most knowledgeable person may need less preparation than someone who has little personal knowledge of the noticed topics, the scope of the deposition is not limited to the knowledge of the "most knowledgeable person" at the organization—it encompasses everything "known or reasonably available to the organization."[18] And in some cases, it might make more sense to educate a deponent who will "present well" at a deposition, rather than simply producing the most knowledgeable witness (if he or she is a "bad" witness).[19]

An ounce of preparation . . . might not be enough

It is perfectly acceptable for a fact witness to answer "I don't know" and "I don't remember" at a traditional deposition. But an unprepared organizational designee deponent who gives the same answers at an ORCP 39 C(6) deposition might be inviting the opposing party—and the court—to ask, "Why not?" Taking time to review corporate documents, deposition exhibits, and previous deposition testimony with the organization's deponent, and interviewing current and former employees, will help your client avoid being on the wrong end of a motion to compel or motion for sanctions.[20]

---

13 Resolution Trust Corp. v. S. Union Co., 985 F2d 196, 197 (5th Cir 1993); Taylor, 166 FRD at 363; Black Horse Lane Assoc., L.P. v. Dow Chem. Corp., 228 F3d 275, 304 (3d Cir 2000).

14 ORCP 46.

15 Sidney I. Schenkier, Deposing Corporations and Other Fictive Persons: Some Thoughts on Rule 30(b)(6), Litigation, Winter 2003, at 20, 62; Paul N. Gold, Deposing the Ventriloquist's Dummy: A Discussion of When and How to Take Depositions of Organizational Representatives, Retreat Materials (La Ass'n of Justice 2007 Post-Legislative Retreat); James S. Goddard et al, Taking and Defending Depositions, 798 PLI/Lit 83, 91 (2009); Steven P. Means, The Corporation as a Witness, Wis Law, July 1996, at 14, 16.

16 Rainey v. Am. Forest & Paper Ass'n, Inc., 26 F Supp 2d 82, 94-95 (DDC 1998) (treating Rule 30(b)(6) testimony as binding, and admitted matters as being conclusively established); A.I. Credit Corp. v. Legion Ins. Co., 265 F3d 630, 637 (7th Cir 2001) (deposition does not bind corporation as judicial admission and can be contradicted at trial); see also R & B Appliance Parts, Inc. v. Amana Co., 258 F3d 783, 786 (8th Cir 2001) (designee no more bound than any witness is by prior deposition testimony and may testify differently at trial); W.R. Grace & Co. v. Viskase Corp., No. 90 C 5383, 1991 WL 211647, at *2 (ND Ill Oct. 15, 1991) (statement may be altered and explained and explored through cross-examination); Boland Marine & Mfg. Co. v. M/V BRIGHT FIELD, No. Civ.A. 97-3097, 1999 WL 280451, at *3 (ED La May 3, 1999) (inadequacies in deponent's testimony must be egregious and not merely lacking in desired specificity in discrete areas).

17 W. Reserve Oil & Gas Co. v. Key Oil, Inc., 626 F Supp 948, 949 (SD W Va 1986) (characterizing preclusion as harsh sanction); United States v. Sumitomo Marine & Fire Ins. Co., 617 F2d 1365, 1369 (9th Cir 1980); Reilly v. NatWest Mkts. Grp. Inc., 181 F3d 253, 269 (2d Cir 1999) (outlining four factors for enforcing preclusive order); Cedar Hill Hardware & Constr. Supply, Inc. v. Ins. Corp. of Hannover, 563 F3d 329, 345 (8th Cir 2009) (exclusion an appropriate sanction, but not necessarily required); Calzaturficio, 201 FRD at 39 (designees inadequately prepared as Rule 30(b)(6) witnesses, and ordered witnesses redeposed).

18 See Taylor, 166 FRD at 361 (corporation with knowledge must designate officer, employee, agent, "or other" individual to present the company's position); Dravo Corp., 164 FRD at 75 (if no current employee has knowledge of requested information, corporation must prepare other witnesses to give "complete, knowledgeable and binding answers on behalf of the corporation") (internal quotation marks and citation omitted).

19 Schenkier, supra, Litigation, Winter 2003, at 23.

20 Marker, 125 FRD at 126-27 (sanctions imposed for failure to provide and prepare Rule 30(b)(6) witness to give "complete, knowledgeable and binding answers on behalf of the corporation").

Labyrinth of Staying In Compliance: I-9 and E-Verify

*By Irina S. Batrakova**

Twenty five years ago, as part of a national effort to stem the flow of illegal immigration into the United States, Congress enacted the *Immigration Reform and Control Act of 1986* ("IRCA"). This Act sought to diminish the lure of American jobs for foreign workers by penalizing employers who knowingly hire "unauthorized aliens"– that is, non-U.S. citizens who are not authorized to accept employment in the United States. To ensure compliance with this employment ban, IRCA established new employment verification and record-keeping rules that apply to the employment of all persons, including U.S. citizens. This sweeping legislation made it unlawful for employers to hire any individual without complying with IRCA's requirements for verification of work eligibility and record keeping.

Generally, employers must meet two related obligations with regard to IRCA's I-9 employment eligibility verification requirements: (1) an employer must not knowingly hire, or continue to employ, any person not authorized to work in the United States; and (2) an employer must verify the identity and employment eligibility of every new employee, whether the person is a U.S. citizen or foreign national, hired on or after November 6, 1986. However, even if an employer completes the employment eligibility verification procedure properly, it still can be subject to severe penalties if it otherwise has knowledge of the unauthorized status of any of its employees. Employees hired on or before November 6, 1986 by a U.S. company abroad and are being transferred to work in the U.S. after working overseas since their original hire date must complete Form I-9 because they are considered new hires under the regulations.

Even if a new employee attends only a few days of training in the U.S. before starting his new job in a foreign country, as long as the employer is paying for this training that is required for the job, Form I-9 must be completed. An employer must complete Form I-9 even for an employee who will attend training in the U.S. only for one day. If the employee is not yet receiving wages and the training is voluntary – or if the training is paid for personally by the employees and the employee will not be reimbursed – then it is likely that Form I-9 would not be required.

Employers are now being encouraged to sign up to participate in E-Verify, the nation's employment authorization status verification program. E-Verify is a free web-based system that allows participating employers to electronically verify the employment eligibility of newly-hired employees. E-Verify is administered by the U.S. Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS"), Verification Division, and the Social Security Administration ("SSA"). Employers submit information taken from a new hire's Form I-9 to the SSA and USCIS to determine whether the information matches government records and whether the new hire is authorized to work in the United States.

SSA also provides Social Security Number Verification Services ("SSNVS"), a service offered by Business Services Online. It allows registered users (employers and certain third-party submitters) to verify the names and Social Security numbers of employees against the SSA's records.

If the name and SSN do not match SSA's records, the employer is prohibited to take any adverse action (such as layoff, suspending, discriminating or firing) against the employee. Any employer that uses the failure of the information to match the SSA records to take inappropriate adverse action against a worker may be in violation of state or federal law.

The driving force behind the employer sanctions provisions of IRCA is to eliminate the major incentive for illegal immigration to the United States: the ready availability of employment. The employer sanctions provisions, however, contain two exemptions. The first is a "grandfather" clause, which exempts from its provisions the continuing employment of unauthorized aliens hired on or before November 6, 1986, the date of the law's enactment. The second exempts "independent contractors" from the employment verification and sanctions provisions, provided the service provider falls within the strict definition of independent contractor.

Section 1 of the I-9 form must be completed by the *employee* on the first day the employee begins work (usually, on the day of hire). The employee must attest on the I-9 form, "under penalty of perjury," that he is not an unauthorized alien, and that the documents he has presented are genuine and relate to him. The employee may choose from among several acceptable documents to submit to the employer to verify his or her identity and authority to work. Hence, an employer may not insist on a specific type of document.

The *employer* must complete *Section 2* of the I-9 form within 3 business days of hiring an employee and attest, "under penalty of perjury," that it has examined certain original documents presented by the employee, that such documentation "appears on its face to be genuine" and relates to the named individual, and that to the best of the employer's knowledge the employee is authorized to work in the United States. These forms must be maintained in the employer's files for a minimum of 3 years, and at all times during the individual's employment until at least 1 year after any termination of employment.

In those instances where the employee's entitlement to work is limited in duration, i.e. their green card or employment authorization document expires on a certain date, the *employer* is required to update and re-verify the employee's continued right to work in the United States. *Section 3* of the I-9 form is used for updating and re-verification. Without such documentation, the employer may not continue to employ the worker without exposing itself to potential fines for paperwork violations, or worse, liability for knowingly employing an alien not authorized to work. Such knowledge may be constructive or actual.

Recent developments have made it even more critical that

employers maintain a strong immigration compliance profile. The administrative enforcement efforts have both increased and broadened in scope. DHS has received much higher levels of funding for employment verification enforcement, and it has far more personnel devoted to employer sanctions than in recent years. As administrative enforcement has increased, addressing complex compliance issues such as contractor and employer relationships has become increasingly difficult. DHS has worked with other law enforcement agencies to pursue criminal sanctions against employers in this area much more aggressively than in the past.

IRCA requires that the employer act in good faith, but does not make the employer a guarantor of each employee's entitlement to work. Hence, fines are imposed only if the employer "knowingly" hires or continues to employ an alien not authorized to work in the United States, or fails to properly complete an I-9 form for an employee subject to the provisions of IRCA. Fines for failure to comply with the employment verification system, i.e. paperwork violations, range from $100 to $1,100 per employee. Fines for employment of unauthorized aliens are substantially higher and range between $250 and $11,000 per unauthorized alien. They may also include criminal charges against the employer.

All employers are required by law to verify the employment eligibility of each new hire. Failure to properly complete Form I-9 can result in the imposition of fines, which may be further compounded if it is determined that the employer "knowingly" hired or continued to employ an unauthorized alien. Any missing or incomplete I-9 forms should be properly completed and the date of any changes or additions should be properly noted. While late completion will not insulate the employer from liability for paperwork violations, it is a mitigating factor and can often reduce the scope and size of any fine that may be imposed. For employers who have not instituted a compliance program, it is recommended that an "immigration audit" be conducted every two to three years and that all personnel records are reviewed to determine which employees require the completion or update of Form I-9.

**Irina S Batrakova is an Associate with Ogletree Deakins and can be reached at irina.batrakova@ogletreedeakins.com*

Top Three Employment Law Myths From Management – BUSTED

*By Karen Davis**

Here at Vigilant, we have been in the business of helping employers with employment-related questions for over 50 years, and there are some workplace myths that just refuse to die. Have your managers fallen for any of these?

Myth #1: *We have to continue health insurance for injured employees out on workers' comp leave.* Reality check: Most health insurance plans require an employee to work a certain number of hours in order to maintain coverage. If the employee has a reduction in hours that would cause a loss of coverage under the terms of the plan, and you keep them on the plan in violation of those terms, the carrier (or stop-loss carrier, if you are self-insured) may refuse to pay the claims. For employers who sponsor a group health plan for 20 or more employees or who participate in a multiemployer group health plan with a total of 20 or more employees, the employee and dependents are entitled to a COBRA notice explaining how to continue coverage for a limited time by self-paying. Failure to issue a COBRA notice on time can result in penalties of up to $110 per day. You can always pay the COBRA premiums on the employee's behalf if you want to be generous, but it is essential that the notice is sent.

Myth #2: *We can fire employees for bad-mouthing our company online.* Reality check: The National Labor Relations Act protects most non-management employees in non-government jobs who band together to protest or discuss issues related to wages, hours, or working conditions. As long as an employee isn't just acting on his or her own behalf, examples of protected complaints include everything from "the wages here suck" to "bring back the candy bars in the vending machines." If an employee is terminated for engaging in protected concerted activity, the National Labor Relations Board can order you to reinstate them with back pay, and to post an embarrassing notice acknowledging your wrongdoing and promising never to repeat it.

Myth #3: *Salaried people don't get overtime.* Reality check: There are very limited categories of salaried jobs that are exempt from overtime in Oregon:

- Executive (generally a primary duty of supervising two or more people)
- Administrative (runs the business behind the scenes—think "marketing director" or "CFO")
- Creative or Learned Professional (think "artist" or "engineer/lawyer/accountant")
- Computer Professional (high-level network administrator)
- Outside Sales (must actually spend most of their time out on the road)

Paying a salary doesn't make someone exempt from overtime. If you have a salaried receptionist who works more than 40 hours in a workweek, then you'll need to pay overtime. How? Calculate the salary as an hourly wage based on all hours worked in the workweek and then pay an extra one-half that rate for all hours worked over 40 in the workweek. And what about those super-dedicated salespeople who work long hours selling your products over the phone and the internet? Unless they qualify under one of the exemptions above, you may have a significant risk of back pay liability if the relationship ever goes south.

If any of these myths have taken hold in your company, now is the time to consider options for quietly bringing the company back into compliance.

** Karen Davis is Senior Employment Attorney at Vigilant (vigilantcounsel.org), an organization dedicated to assisting employers in the Pacific Northwest and California.*